In the Supreme Court of the United States.

OCTOBER TERM, 1918.

THE PORTSMOUTH HARBOR LAND AND Hotel Company, a Corporation; Caroline E. Peabody; Amory Eliot, Administrator of the Estate of Mary R. Peabody, Deceased; S. Ellery Jennison and Mary M. Jennison, Appellants,

v.

THE UNITED STATES.

No. 381.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

This is an appeal from the judgment of the Court of Claims dismissing the claimants' petition to recover the value of certain land alleged to belong to the claimants and to have been taken by the United States in the exercise of its power of eminent domain.

On August 20, 1902, the Portsmouth Harbor Land & Hotel Co., acquired by conveyance a tract of land of about 200 acres forming the southern corner of Gerrish Island, Me. It borders the Atlantic Ocean

on the south and east and on the west the entrance to Portsmouth Harbor. The land is of little value except for use as a summer resort. A hotel, cottages, outbuildings, and a pier were erected on the land prior to 1895. The hotel and property were used as a summer resort up to the end of the season of 1904. (Findings II, III, and XVIII, R. 12, 13, 18.)

On June 21, 1915, the Saco & Biddeford Savings Institution, which held a mortgage upon the easterly 155 acres of the land, foreclosed and the mortgagor's right of redemption has since expired. The value of the land thus foreclosed is $75,000, the value of the remaining westerly portion of the tract being $50,000. The Saco & Biddeford Savings Institution is not a party to this suit. (Findings IV and V, R. 13, 14.)

In 1873 the United States began the construction of a 12-gun battery upon a tract of land of approximately 40 acres lying immediately to the north of the western portion of the claimant company's land. In 1876 work was suspended on account of lack of appropriations, but in 1898 work was resumed. A battery of three 10-inch guns and of two 3-inch rapid-fire guns was installed in 1901, and the fortification was transferred to the artillery, being named Fort Foster. (Finding VI, R. 14, 15.)

In erecting Fort Foster it was not the intention of the Government to fire any of its guns over any of the claimants' land in times of peace. The only firing intended was occasionally for testing purposes, and then only over the Government's own premises. (Finding XV, R. 18.)

In fact, Fort Foster was never garrisoned and no target practice has ever taken place there. Until the summer of 1917, when its guns were dismounted and removed its batteries were kept in condition by a small detail from a fort just across the harbor from Fort Foster. It has been the settled policy of the military authorities not to train gun crews at all its coast fortifications. (Finding VIII, R. 16.)

On June 20, 1902, two shots, and on September 26, 1902, one shot, were fired for testing purposes. The shots passed over the western extremity of the claimants' land. (Finding IX, R. 16.) The claimants in 1905 brought suit in the Court of Claims on the ground that their land had been taken by the United States for public use. (*Peabody* v. *U. S.*, 46 Ct. Cl. 39.) Judgment of the Court of Claims dismissing the petition was affirmed on appeal to this court. (*Peabody* v. *U. S.*, 231 U. S. 530.) The holding was that the three shots fired did not constitute an appropriation of the land, and that it was not established that the United States intended to impose a servitude on the land by firing across it for practice purposes. (R. 19, 23, 24.)

On November 23, 1914, one shot was fired from gun No. 1 and two shots from gun No. 2. On August 26, 1915, two shots were fired from gun No. 3, and on November 19, 1915, one shot was fired from gun No. 2. These shots were fired for the purpose of testing certain modifications which had been made in the gun carriages. No further shots have been fired up to the present time. (Finding IX, R. 16.)

In *Peabody* v. *U. S.*, *supra*, it was decided that the boundary line between the claimants' and the Government's lands over the flats between high and low water was obtained by making an equitable division of the flats according to the rule established by the Maine courts. This is shown by the line A to F on the plat printed opposite page 26 of the record. If the boundary line is so determined the only shots since 1902 which passed over claimants' land were the two shots fired from gun No. 3 in August, 1915. Approximately half an acre of land of insignificant value, only half of which was above high water, was so fired over. (Finding XI, R. 17.)

The Court of Claims in this case held that certain new evidence offered did not show any reason for changing the determination made in the *Peabody case* as to the proprietorship of the tidewater lands. The boundary line was there determined from the call of the deed to the United States.

Before the shots of 1914 and 1915 were fired the officer in charge placed a flag on what he believed to be the line between the Government's and the claimants' lands, and he directed the gunners to fire so that the missiles would all pass over the Government lands. (R. 22.) It was due to a misunderstanding on the part of the officer as to the boundary line that the flag was misplaced and two shots passed over a portion of claimants' land. (Finding XII, R. 17.) Accepting the boundary established by the *Peabody case*, guns No. 1 and No. 2 can be safely

fired to sea over only Government land, and gun No. 3 can be so fired at long-range distances. (Finding VII, R. 15.)

It appeared also that before the firing the occupants of the structures on claimants' lands were notified of what was intended and warned to take measures accordingly.

The hotel and property here in question were successfully operated during the season of 1902, and during the season of 1903 there were the usual number of guests and tenants. The season of 1904 was financially unsuccessful, and partly for that reason and partly on the advice of counsel in the *Peabody case*, operation of the property as a summer resort was thereafter discontinued. (Finding XVIII, R. 19.) There are numerous successfully operated summer-resort hotels and properties in the United States situated with reference to coast-defense batteries of heavy guns substantially as the claimants' property is situated. (Finding XVI, R. 18.) The firings of 1914 and 1915 do not appear to have caused any damage to the claimants' buildings or other improvements. (Findings IX, R. 16.)

ARGUMENT.

I. CLAIMANTS' LAND WAS NOT "TAKEN" BY FIRING OVER IT.

A. Use which is not shown to have been intentional does not constitute a "taking" which will support recovery.

The Court of Claims, after considering such new evidence as was offered to it, found that it had no occasion to alter the determination reached in the former case (46 C. Cls. 39) as to the ownership by the United States of a portion of the shore sufficient to permit the firing of the guns in question without shooting over claimants' land. It determined the boundaries from the call of the deed to the United States (R. 22) by applying the local law governing the boundary lines of contiguous proprietors where there is a curve of the shore. (Comp. *Peabody* v. *United States*, 231 U. S. 530, 537.)

With the boundaries thus determined, it found not only that all the guns here in question could be fired without passing over claimants' land, but also that in fact only two shots had been fired over claimants' land since the firing in 1902, which was the subject of the earlier decision approved by this court in the *Peabody case*. These two shots, fired in 1915 from what is called gun No. 3, passed over a corner of claimants' land found (R. 17) to be of trifling value.

Unless this "use" of claimants' land was intentional on the part of the Government it could at best constitute a tortious act of the Government's officers. Such an act will not support recovery in the Court of Claims as for a taking.

For a taking there must be the essential elements of contract. It may be implied where there has been intentional authorized use of what is recognized to be the property of another as in *United States* v. *Great Falls Mfg. Co.*, 112 U. S. 645. But even where the use is intentional, if it is made without any recognition of any adverse interest in the property, there is no intention to appropriate and no "taking" such as to impose a liability in contract will be implied. (*Russell* v. *United States*, 182 U. S. 516; *Harley* v. *United States*, 198 U. S. 229.) In *Schillinger* v. *United States*, 155 U. S. 163, this court pointed out that the Government had proceeded with respect to the claimant's property at all times as if it were its own property, and held that the claim was one sounding in tort, and indeed that the facts disclosed a tort. Recovery was refused. In *Harley* v. *United States*, 198 U. S. 229, recovery was denied in a case where the officers of the Government understood that they were using a device belonging to the claimant, but also supposed that the owner, who happened to be an employee of the Government, would not expect remuneration. It was held that there was no coming together of the minds of the parties, and that there was therefore no taking which would support a recovery.

Manifestly a case where the use made by the Government is wholly unintentional is very much weaker from the point of view of the claimants than those just referred to.

B. There was here no intentional use of claimants' land.

And so it had been said in the former case (*Peabody* v. *United States*, 231 U. S. 530) that the decisive question was whether it was shown that the Government intended to impose any servitude upon the claimants' lands by firing across them from time to time during periods of peace. It was held that building the fort and firing the shots fired in 1902 did not establish such an intention.

In the present case the findings of the Court of Claims dispose of such a contention. It is found that under the practice of the War Department and the appropriate regulations practice firing is not done at fortifications like these. (R. 46) It is found that the only firing of these guns subsequent to that of 1902 was for the purpose of testing modifications of their installation. It is found that the shots fired were fired over the Government's own land with the exception of two shots. (R. 47.) It is found that special precautions were taken to avoid any firing over claimants' land, and that these precautions were supposed to have been adequate, and that the trespass involved in the two shots which did pass over a corner of claimants' land was the result of an error.

In view of these specific findings the Court of Claims correctly passed over the contention that gun No. 3 is now so installed that it can not be fired entirely over Government land except at long-range

distances. In view of the showing that no intention is shown to fire the gun for practice purposes in times of peace or for any purpose except perhaps for occasional tests when changes are made, this fact is without significance. As the Court of Claims points out the installation can be changed. But apart from that no reason is shown why firing at long range distances is not perfectly satisfactory for the testing purposes for which the gun is to be fired, if it is fired.

The claim is of a taking in 1914. In view of the absence of amendment to the petition, it is noteworthy that this firing of gun No. 3 was in 1915. It is not without significance that the guns were removed for more urgent use elsewhere in 1917. Whether they will be restored, and if so how they will be mounted, is a problem of the future.

II. Claimants' Land was not "Taken" by Occasional Test Firing Over the Government's Own Land.

Whatever might be said of the necessities of a broad field of fire for adequate target practice, that question does not arise here in view of the specific findings already referred to that practice firing is not contemplated at stations like this. For the purpose of occasional shots with a view to testing the guns or their mounts it is obvious that it is enough if there is a zone through which the projectiles can pass.

In the *Peabody case*, supra (538), discusses what practice firing "directly across" claimants' land might

be said to be a taking. But it also said, still speaking of practice firing (539):

> Land, or an interest in land, can not be deemed to be taken by the Government merely because it is suitable to be used in connection with an adjoining tract which the Government has acquired or because of a depreciation in its value due to the apprehension of such use.

This was directly in response to the suggestion that the claimants' land afforded a field of fire necessary to "proper practice," to which the Government had answered that it could do whatever firing it wished to do over its own land. It is apparent from the decision and from the cases cited therein (538) that any ill effects upon claimants' land from occasional test firing over the Government's own land was "merely consequential damage incident to a public undertaking which must be borne without any right to compensation. (538.)

The rule of law here applicable was carefully stated in *Richards* v. *Washington Terminal Co.*, 233 U. S. 546, 554:

> Any diminution of the value of property not directly invaded nor peculiarly affected, but sharing in the common burden of incidental damages arizing from the legalized nuisance, is held to be not a "taking" within the constitutional provision.

III. The Firing Shown in the Record has not in Fact Deprived Claimants of the Use and Enjoyment of Their Land.

It is here found (R. 18) that in the season of 1903, which followed the firing held in the *Peabody case, supra*, not to have been a taking, claimants' hotel enjoyed its normal patronage. It was given up after a bad season in 1904, partly on advice of counsel in that case (R. 19), but no further firing had intervened. It has apparently not been used for resort purposes since. It is also found that numerous successful summer resort hotels are in situations like that of claimants' land. (R. 18, Finding XVI.) Finally, it is found as a fact that no damage to the buildings or other improvements on claimants' land resulted from the firing here relied upon. (Finding IX, R. 16.)

It follows that claimants have not been deprived of the use or enjoyment of their land. The alleged basis for the right asserted is therefore lacking. (*Richards* v. *Washington Terminal Co.*, 233 U. S. 546, 552.)

CONCLUSION.

The judgment of the Court of Claims should be affirmed.

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